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Herr v. U.S. Forest Service

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***Herr v. U. S. Forest Service*, 865 F.3d 351 (6th Cir. 2017)**

Peter B. Taylor

In *Herr v. U. S. Forest Service*, the Sixth Circuit ruled on whether the Forest Service could infringe on pre-existing private property rights held adjacent to a designated Wilderness Area. The Herrs purchased lakefront property adjacent to the Sylvania Wilderness in the Upper Peninsula of Michigan with the intention of using their littoral rights for recreational boating. The Sylvania Wilderness was created under the Michigan Wilderness Act in 1987, but the Act observed valid existing rights. The court found that the Herrs' littoral rights were recognizable "valid existing rights." Therefore, the Forest Service's restriction of those rights was illegal.

I. INTRODUCTION

David and Pamela Herr ("Herrs") purchased lakefront property on Crooked Lake in Michigan in 2010.¹ Since Crooked Lake lies predominately within the boundary of the Sylvania Wilderness, the Herrs' property was surrounded by land owned largely by the federal government.² Prior to purchasing the property, the seller assured the Herrs littoral rights to the use of Crooked Lake would transfer with the property.³ Under Michigan law, littoral rights are defined as rights that provide lakefront landowners "a right to the reasonable use of the water's full surface."⁴ The Herrs' purchased the property intending to use their littoral rights to operate a motorboat recreationally on the lake.⁵ However, in 2013 the Forest Service began enforcing a 1995 amendment to its management plan, which prohibited almost all motorized boats on the Wilderness portion of the lake and instituted a "slow-no wake" speed of five miles per hour on the entire lake.⁶ As a result, the Herrs' existing littoral rights to the "reasonable use" of the lake were invalidly subordinated.⁷

The 1987 Michigan Wilderness Act governs the Forest Service's management of the Sylvania Wilderness, and management under the Act is "subject to valid existing rights."⁸ The court found that the Herrs' littoral right to recreational boating was a right that transferred with the land, and therefore, was a "valid existing right" under state law prior to the 1987 Michigan Wilderness Act.⁹ After reviewing state law to define reasonable

1. *Herr v. U. S. Forest Service*, 865 F.3d 351, 355 (6th Cir. 2017).

2. *Id.* at 354.

3. *Id.* at 355.

4. *Id.* at 356 (citing *Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 415 Mich. 45, 327 N.W.2d 838, 842 (1982)).

5. *Id.*

6. *Id.* at 354.

7. *Id.* at 355.

8. *Id.* at 354.

9. *Id.* at 357.

use, the court noted Michigan courts have “repeatedly indicated” that recreational boating “amounts to reasonable use.”¹⁰ The court held that the Forest Service could not legally define “reasonable use” on the surface of Crooked Lake, and that the Herrs had a right to use a motorboat for recreational boating on the lake.¹¹

II. FACTUAL BACKGROUND

A. Crooked Lake: History and Ownership

Crooked Lake, which stretches three miles from end to end via a network of channels and bays, is located on the Upper Peninsula of Michigan.¹² In 1966, the United States purchased 14,000 acres surrounding the southern portion of the lake to supplement the Ottawa National Forest.¹³ These lands were then dedicated in 1987 under the Michigan Wilderness Act to the National Wilderness Preservation System as part of the Sylvania Wilderness (“Wilderness”), a nature preserve open to the public.¹⁴ Ninety-five percent of the land surrounding Crooked Lake is within the Sylvania Wilderness.¹⁵

Surrounded by old growth forest, the lake offers a variety of outdoor activities for visitors.¹⁶ Traditional uses of the lake include fishing, hiking, bird watching, and kayaking.¹⁷ Use of motor boats on the lake was also permitted or tolerated until 2013, despite ever-changing regulations and rules.¹⁸ Prior to 2013, the Forest Service sold boating permits and maintained a public boat landing on a federally-owned portion of the northern bay, which was not within the Wilderness boundary.¹⁹

David and Pamela Herr purchased two lots in the northern bay of Crooked Lake in 2010.²⁰ They became one of ten private land owners on the lake, which collectively comprised the five-percent of the land surrounding Crooked Lake not owned by the federal government.²¹ Prior to purchasing their property, the Herrs were occasional visitors. With their purchase they intended to use gas-powered motorboats on the lake.²² The

10. *Id.* (citing *Burt v. Munger*, 314 Mich. 659, 23 N.W.2d 117, 119–20 (1946); *Rice*, 155 N.W.2d at 372; *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211, 211–12, 218 (1902); *Pierce v. Riley*, 81 Mich. App. 39, 264 N.W.2d 110, 114 (1978); *Tennant*, 249 N.W.2d at 349)).

11. *Id.*

12. *Id.* at 353.

13. *Id.*

14. *Id.* at 354 (citing Michigan Wilderness Act, Pub. L. No. 100–184, § 5, 101 Stat. 1274, 1275–76 (1987)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 355.

19. *Id.*

20. *Id.*

21. *Id.* at 354.

22. *Id.* at 355.

Herrs confirmed with the sellers that motorboat use was allowed and were informed that the previous owners used motorboats “without hindrance from the Forest Service.”²³ The Herrs used gas-powered motorboats on the lake until 2013, at which point the Forest Service began enforcing its ban on motorboat use.²⁴

B. Pertinent Federal Regulations and Forest Service Policies

The management of the Sylvania Wilderness area is directed under the Michigan Wilderness Act.²⁵ The relevant portion of the act reads “‘subject to existing rights,’ the Michigan Wilderness Act directs the Forest Service to administer this area in accordance with the Wilderness Act of 1964.”²⁶ The 1964 Act provides that the Forest Service “shall be responsible for preserving the wilderness character” of the land.²⁷ With regards to motorboat use the Act reads: “subject to existing private rights... there shall be... no use of ... motorboats,” within any wilderness area. However, in a subsequent section, the Act states, “[w]here these uses have become established ... [motorboats] may be permitted to continue subject to such restrictions as the [Forest Service] deems desirable.”²⁸

After its initial enactment in 1987, the Forest Service twice amended the Ottawa National Forest Management Plan, which controls the Sylvania Wilderness.²⁹ In 1992, the Forest Service amended the Plan (“Amendment No. 1”) to prohibit the use of sailboats and houseboats on all portions of Crooked Lake within the Sylvania Wilderness.³⁰ The Plan was amended in 1995 (“Amendment No. 5”) to include the following provisions: the plan 1) prohibited the use of “any motor or mechanical device capable of propelling a watercraft by any means” on the Wilderness portion of Crooked Lake, 2) excepted one *electric* motor no greater than 24 volts in size or 48 pounds of thrust on the entire lake, and 3) prohibited watercraft from exceeding five miles per hour on the entire lake.³¹ The 2006 Forest Plan and 2007 Forest Order codified these restrictions and subjected violators to criminal liability.³² Despite these changes to Forest Service regulations, motorboat use continued on Crooked Lake until 2013, three years after the Herrs purchased their property.

23. *Id.*

24. *Id.*

25. *Id.* at 354. (citing Michigan Wilderness Act, Pub. L. No. 100–184, § 5, 101 Stat. 1274, 1275–76 (1987)).

26.

27. *Id.* (citing 16 U.S.C. § 1133(b) (2014)).

28. *Id.* (citing 16 U.S.C. § 1133(c) (d)(1)).

29. *Id.*

30. *Id.*

31. *Id.* (emphasis added).

32. *Id.*

C. Prior Litigation

A landowner challenged Amendment No. 1 in 1993 in *Stupak–Thrall v. United States (Stupak–Thrall I)*, and the district court sided with the Forest Service, upholding restrictions against sailboats and houseboats.³³ The Sixth Circuit Court of Appeals reviewed the case sitting en banc, and an equally divided court left no controlling law on this issue.³⁴ The same landowner challenged Amendment No. 5 in 1997 in *Stupak–Thrall v. Glickman (Stupak–Thrall II)*, and the district court ruled in favor of the land owner.³⁵ The court held that the motorboat restrictions interfered with the land owner’s “valid existing right” and was a regulatory taking under the Fifth Amendment.³⁶ Subsequently, a Forest Service land transaction greatly reduced the amount of motorboat use on Crooked Lake, which resulted in the Forest Service dropping their appeal.³⁷ As a result of the Sixth Circuit’s split decision, the district court’s injunction protected the landowner’s continued use of motorboats on all of Crooked Lake. No other land owner was covered by the injunction. The court noted “how odd” it was to allow one landowner to operate motorboats on all the lake but not the remaining nine, stating “if motorboat use is objectively unreasonable for one, it is objectively unreasonable for all.”³⁸

III. PROCEDURAL BACKGROUND

In 2013, the Forest Service ceased offering motorboat access at the landing dock and informed the Herrs it planned to “fully enforce” the motorboat restrictions on the Wilderness portion of the lake.³⁹ In response, the Herrs filed suit against the Forest Service under the Administrative Procedure Act.⁴⁰ The district court dismissed the case for lack of subject matter jurisdiction since the statute of limitations had run, but the Sixth Circuit Court of Appeals overruled and remanded the case.⁴¹ On remand, the district court ruled in favor of the Forest Service, finding that the Herrs’ rights did not “exist” in 1987 when the Michigan Wilderness Act was enacted and, therefore, could not be considered a “valid existing right.”⁴²

33. *Id.* (citing *Stupak–Thrall v. United States*, 843 F.Supp. 327 (W.D. Mich. 1994)).

34. *Id.* (citing *Stupak–Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996)).

35. *Id.* at 355 (citing *Stupak–Thrall v. Glickman*, 988 F.Supp.1055 (W.D. Mich. 1997)).

36. *Id.*

37. *Id.*

38. *Id.* at 358.

39. *Id.* at 355.

40. *Id.* (citing 5 U.S.C. § 702)

41. *Id.* (citing *Herr v. U.S. Forest Serv.*, 803 F.3d at 813, 819 (W.D. Mich. 2016)).

42. *Id.* at 356 (citing *Herr v. U.S. Forest Serv.*, 212 F.Supp.3d 720, 727–28 (W.D. Mich. 2016)).

IV. ANALYSIS

A. Undisputed Features of the Legal Landscape

After having adjudicated the littoral uses of Crooked Lake for almost a quarter century, the court began their analysis by summarizing the undisputed legal parameters.⁴³ First, the Property Clause of the United States Constitution enables Congress to “make all needful regulations respecting the Territory or other Property belonging to the United States.”⁴⁴ Second, Congress has broad discretion to regulate its own property, but does not have the same authority over private property.⁴⁵ Third, the federal government may regulate private property for the protection of adjacent federal property.⁴⁶ Fourth, through the Michigan Wilderness Act and the Property Clause, the Forest Service has the authority to regulate the public’s use of the Sylvania Wilderness and Crooked Lake subject only to existing rights.⁴⁷ Fifth, riparian rights (a property owner’s right to use adjacent rivers) and littoral rights (a property owner’s right to use of adjacent lakes) represent a form of protected right under the Michigan Wilderness Act.⁴⁸ Finally, under Michigan law, littoral rights include the right to use of the lake bed to its mid-point and a right to the reasonable use of the water’s full surface.⁴⁹ Under this final premise, the court determined that the Herrs share littoral rights to the “reasonable use” of the entire surface of Crooked Lake, which includes the portion within the Sylvania Wilderness, with the federal government and all other private property owners that own land adjacent to the lake.⁵⁰

B. “Subject to valid existing rights”

Having fully established these fundamental background principles, the court employed a plain meaning approach to interpreting the “subject to valid existing rights” language of the Michigan Wilderness Act.⁵¹ The court defined “subject to” as meaning “subordinate” or “subservient,” dictating that the federal government must respect and observe the Herrs’ rights if found to be in existence prior to the Act.⁵² Next,

43. *Id.*

44. *Id.* (citing U.S. Const. art. IV, § 3, cl. 2.)

45. *Id.* (citing *Kleppe v. New Mexico*, 426 U.S. 529, 539-70, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); *Camfield v. United States*, 167 U.S. 518, 17 S.Ct 864, 42 L.Ed. 260 (1897)).

46. *Id.* (citing *Kleppe*, 426 U.S. at 539-70).

47. *Id.*

48. *Id.* (citing *Dyball v. Lennox*, 260 Mich.App. 698, 680 N.W.2d 522, 526 (2004); *Bott v. Comm’n of Nat. Res. Of State of Mich. Dep’t of Nat. Res.*, 415 Mich. 45, 327 N.W.2d 838, 841 (1982)).

49. *Id.* (citing *Lorman v. Benson*, 8 Mich. 18, 22 (1860); *Bott*, 327 N.W.2d at 842.)

50. *Id.*

51. *Id.*

52. *Id.*

the court established that under Michigan Law littoral rights ran with the land. Therefore, the rights were in “existence” prior to the 1987 Michigan Wilderness Act and transferred with the property when the Herrs purchased it.⁵³ Thus, the court concluded the Herrs’ littoral rights were “valid existing rights.”

C. Who defines “reasonable use” of the surface of Crooked Lake?

Finding that the Act was “subordinate” to the Herrs’ littoral rights, the final issue the court resolved was what constituted reasonable use and who could establish reasonable use on Crooked Lake. The Forest Service contended that the limits imposed under Amendment No. 5 amounted to a reasonable use for a remote lake, like Crooked Lake. While the court acknowledged that the premise of the Forest Service’s contention was correct, it found its conclusion was not.⁵⁴ The Herrs’ “valid existing” littoral right existed under state law and could only be regulated by state law, “not federal law, and certainly not federal law as construed by a federal agency.”⁵⁵ The court pointed to both legal authorities and historical facts to conclude that the Herrs’ littoral rights existed prior to the formation of the Sylvania Wilderness.⁵⁶ Boating on Crooked Lake had been a reasonable use since the 1940’s and continued to be recognized as a reasonable use by the state on the portion of Crooked Lake not within the Wilderness boundary.⁵⁷ The court also pointed to the Forest Service’s allowance and facilitation of motorboat use on Crooked Lake until 2013 and one landowner’s continued use of motorboats on Crooked Lake as proof that Herrs’ recreational use of motorboats above five miles per hour would be considered “reasonable under state law.”⁵⁸

The court expressly denied the Forest Service’s contention that it can regulate the use of Crooked Lake under the Wilderness Act and the Property Clause.⁵⁹ The court stated “[t]he Michigan Wilderness Act does not grant the Forest Service a power coextensive with Congress’ plenary authority under the Property Clause. It instead delegates a power limited by existing rights – ‘subject to valid existing rights.’”⁶⁰ The Forest Service is required by the Michigan Wilderness Act to observe pre-existing property rights. Therefore, the court found that the Forest Service could not nullify the Herrs’ pre-existing right to recreational motorboating.⁶¹

53. *Id.* (citing *Thompson v. Enz*, 379 Mich. 667, 154 N.W.2d 473, 483 (1967)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 358.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 359.

V. CONCLUSION

The Sixth Circuit's ruling in *Herr v. U. S. Forest Service* helps clarify the rights of existing landowners near Wilderness areas.⁶² As more areas are designated Wilderness and future National Monuments are created, it will be important for lawmakers and agencies to consider existing rights in the drafting of legislation and policy. Further, as conflicts between federal agencies and private land owners arise throughout the United States, the question of how far the courts will be willing to extend the Property Clause to allow federal regulation of private land and property rights will be increasingly examined. The Sixth Circuit's holding is an important decision in the discussion of pre-existing private property rights in areas surrounded by federal land and will act as persuasive precedent in future disputes.

62. *Id.*